

1 NICOLA T. HANNA
United States Attorney
2 DENNISE D. WILLETT
Assistant United States Attorney
3 Chief, Santa Ana Branch Office
CHARLES E. PELL (Cal. Bar No. 210309)
4 Assistant United States Attorney
Santa Ana Branch Office
5 Ronald Reagan Fed. Bldg. & United States Courthouse
411 West Fourth Street, Suite 8000
6 Santa Ana, California 92701
Telephone: (714) 338-3542
7 Facsimile: (714) 338-3561
E-mail: Charles.E.Pell2@usdoj.gov

8
Attorneys for Plaintiff/Respondent
9 UNITED STATES OF AMERICA

10 UNITED STATES DISTRICT COURT

11 FOR THE CENTRAL DISTRICT OF CALIFORNIA

12 SOUTHERN DIVISION

13 UNITED STATES OF AMERICA,

No. SA CR 19-00016-JVS

14 Plaintiff,

GOVERNMENT'S MOTION FOR COURT
ORDER DECLARING PARTIAL WAIVER OF
ATTORNEY-CLIENT PRIVILEGE AND
COMPELLING DISCLOSURE OF CERTAIN
ATTORNEY-CLIENT COMMUNICATIONS;
MEMORANDUM OF POINTS AND
AUTHORITIES; [PROPOSED] ORDER
REGARDING WAIVER OF ATTORNEY-
CLIENT PRIVILEGE

15 v.
16 DONGYUAN LI,
17 Defendant.

20 Plaintiff United States of America, by and through its counsel
21 of record, the United States Attorney for the Central District of
22 California and Assistant United States Attorney Charles E. Pell,
23 hereby files this motion for a Court Order: (1) declaring that
24 defendant DONGYUAN LI has waived her attorney-client privilege with
25 respect to communications between her and her attorneys Thomas P.
O'Brien and David J. Carroll, concerning the events and facts
surrounding defendant's conversation with defense counsel that is
proffered in the declaration of defense counsel David J. Carroll (DE

1 43-1) submitted in support of defendant's motion to revoke the
2 Magistrate Court's detention Orders (DE 43); and (2) compelling
3 attorneys Thomas P. O'Brien and David J. Carroll to testify at the
4 hearing on April 8, 2019, about those communications with defendant.

5 This application is based upon the attached memorandum of points
6 and authorities, all files and records in the case, and upon such
7 further evidence or argument as may be requested by the Court.

8 Dated: April 2, 2019

Respectfully submitted,

9 NICOLA T. HANNA
United States Attorney

10 DENNISE D. WILLETT
11 Assistant United States Attorney
12 Chief, Santa Ana Branch Office

13 /s/
14 CHARLES E. PELL
15 Assistant United States Attorney
16 Santa Ana Branch Office

17 Attorneys for Plaintiff/Respondent
18 UNITED STATES OF AMERICA

19
20
21
22
23
24
25
26
27
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. PROCEDURAL BACKGROUND

The government's opposition filed earlier this evening details the relevant procedural history. (DE45 at 1-2.)

Also on March 27, 2019, in support of defendant's motion to revoke the Magistrate Court's detention Orders and argued therein (DE43), the defense attached the declaration of defense counsel David J. Carroll that proffered the date and substance of communications between defendant and defense counsel (DE43-1).

II. SUMMARY OF ARGUMENT

Under Ninth Circuit law, defendant has waived her attorney-client privilege with respect to the conversation she had with defense counsel that she proffered in defense counsel's declaration that was submitted in support of her appeal of the Magistrate Court's detention decisions. In her motion, she relies on and argues using communications between her and her attorneys to support her challenge to the Magistrate Court's detention Orders.

The government's opposition to defendant's motion adequately explains why the Magistrate Court correctly decided the detention issue, twice. Nevertheless, because defendant has raised the substance of her communication with defense counsel in her counsel's declaration and argued it in her motion, in order for this Court and the government to fairly address it, the Court and government need to be provided accurate facts regarding what defense counsel actually said to or advised defendant about the issues she raises in her motion as related to that communication, as well as defendant's statements in that same conversation. Consequently, the government requests that the Court: (1) declare that defendant DONGYUAN LI has

1 waived her attorney-client privilege with respect to communications
2 between her and her attorneys Thomas P. O'Brien and David J. Carroll,
3 concerning the events and facts involved in defendant's conversation
4 with defense counsel that is proffered in the declaration of defense
5 counsel David J. Carroll (DE43-1) submitted in support of defendant's
6 motion to revoke the Magistrate Court's detention Orders (DE 43); and
7 (2) compel attorneys Thomas P. O'Brien and David J. Carroll to
8 testify during the hearing on April 8, 2019, about those
9 communications with defendant.¹

10 **III. ARGUMENT**

11 In her motion, defendant claims that discussions that occurred
12 with her counsel support her challenge to the Magistrate Court's
13 detention decisions. Specifically, defendant claims that on January
14 23, 2019, her counsel discussed with her defense counsel's meeting
15 with the government that occurred the previous day, including "that
16 Ms. Li's indictment was imminent." (DE43-1 at 2.) She also argues
17 in her motion that she did not flee, even though based on that
18 conversation with defense counsel, there was "no doubt in her mind
19 that the government intended to prosecute her." (DE43 at 12.)

20 The attorney-client privilege protects confidential
21 communications between attorneys and their clients. Fed. R. Evid.
22 501, 502. However, the privilege may be waived as to a particular
23

24 ¹ The day after defendant filed her motion, on March 28, 2019,
25 the government reached out to defense counsel to determine whether
26 they would prefer to withdraw the declaration and argument premised
27 upon their communications with the defendant, because the government
28 would otherwise be filing the instant motion seeking a finding of
waiver of the attorney-client privilege. Defense counsel indicated
that they did not believe there had been a waiver, so would not be
withdrawing the declaration, and they would oppose a motion by the
government that requested waiver.

1 communication between an attorney and client if it is disclosed by
2 either of them.

3 Defendant affirmatively raised the substance of conversations
4 between her and her counsel by arguing it in her motion and
5 proffering it in her counsel's declaration in this matter.
6 Accordingly, by arguing and proffering her conversation with defense
7 counsel, defendant has waived the attorney-client privilege on that
8 same conversation. See, e.g., Bittaker v. Woodford, 331 F.3d 715,
9 716 (9th Cir. 2003) ("It has long been the rule in the federal courts
10 that, where a habeas petition raises a claim of ineffective
11 assistance of counsel, he waives the attorney-client privilege as to
12 all communications with his allegedly ineffective lawyer."); see also
13 Wharton v. Calderon, 127 F.3d 1201, 1203 (9th Cir. 1997) (defendant
14 waived attorney-client privilege by raising ineffective assistance of
15 counsel claim in a habeas proceeding); Tasby v. United States, 504
16 F.2d 332, 336 (8th Cir. 1974) (attorney-client privilege waived when
17 defendant, in § 2255 proceeding, attacked his attorney's competence
18 in giving legal advice, and ascribed course of action to his attorney
19 that raised specter of incompetence). Tasby explained the rationale
20 for the rule, which is premised on fairness. 504 F.2d at 336.

21 The same reasoning applies to the non-habeas context, where a
22 party affirmatively raises attorney-client communications in their
23 case. E.g., Rock River Commc'ns, Inc. v. Universal Music Grp., Inc.,
24 745 F.3d 343, 353 (9th Cir. 2014) ("Defendants waived the protection
25 of the privilege by relying on an advice-of-counsel defense.");
26 United States v. Quiel, 595 F. App'x 692, 694 (9th Cir. 2014) ("A
27 party who affirmatively places its attorney-client communications at
28 issue in a litigation implicitly waives the privilege.").

1 In other words, defendant cannot in this case try to use her
 2 communications with defense counsel as a sword to wield against the
 3 Magistrate Court's detention Orders, but then simultaneously use the
 4 attorney-client privilege as a shield against this Court and the
 5 government's inquiring as to the substance of those same
 6 communications. E.g., United States v. Ortland, 109 F.3d 539, 543
 7 (9th Cir. 1997) ("The privilege which protects attorney-client
 8 communications may not be used both as a sword and a shield. Where a
 9 party raises a claim which *in fairness* requires disclosure of the
 10 protected communication, the privilege may be implicitly waived."
 11 (emphasis in original) (citation omitted)); see also United States v.
 12 Amlani, 169 F.3d 1189, 1195-96 (9th Cir. 1999) (finding that district
 13 court did not err by finding waiver of attorney-client privilege in
 14 case where defendant claimed that prosecutor's disparaging remarks
 15 about his attorney caused him to sever his attorney-client
 16 relationship). That would not be fair.

17 Under the Ninth Circuit's three-part Amlani test,² defendant has
 18 waived her attorney-client privilege. She waived the attorney-client
 19 privilege by affirmatively raising and proffering her conversations
 20 with counsel on an issue that she then argued in her motion to revoke
 21 the Magistrate Court's detention Orders. The government respectfully
 22 requests that the Court order a partial waiver of the attorney-client
 23 privilege and compel disclosure by defense counsel of all
 24

25 ² The Ninth Circuit generally uses a three-prong test to
 26 determine whether a waiver has been effected: (1) whether the party
 27 is asserting the privilege as the result of some affirmative act,
 28 such as filing suit; (2) whether through that affirmative act, the
 asserting party puts the privileged information at issue; and
 (3) whether allowing the privilege would deny the opposing party
 access to information vital to its case. Id. at 1195 (quoting
 cases).

1 communications with defendant that surround the communication that
2 she raised and argued in her motion and described in her defense
3 counsel's declaration.

4 The scope of the proposed waiver is narrow. The waiver is
5 limited to the conversation between defendant and her counsel on a
6 specific date, January 23, 2019, about their conversation with the
7 government the previous day regarding whether she would be charged,
8 detained, and surrounding facts. Accord In re Premera Blue Cross
9 Customer Data Sec. Breach Litig., 296 F. Supp. 3d 1230, 1249 (D. Or.
10 2017) ("Regarding the scope of this waiver, '[t]he widely applied
11 standard for determining the scope of a waiver of attorney-client
12 privilege is that the waiver applies to all other communications
13 relating to the same subject matter.'" (quoting case)).

14 Last, the Proposed Order appropriately strikes a balance between
15 protecting defendant's attorney-client privilege and permitting a
16 fair resolution of her motion. The Proposed Order limits the waiver
17 to "communications between her and her attorneys Thomas P. O'Brien
18 and David J. Carroll, concerning the events and facts surrounding
19 defendant's conversation with defense counsel on January 23, 2019,
20 that is proffered in the declaration of defense counsel David J.
21 Carroll (DE 43-1) submitted in support of defendant's motion to
22 revoke the Magistrate Court's detention Orders (DE 43)," which she
23 affirmatively put at issue by raising and arguing it in her motion
24 and attached declaration.

25 **IV. CONCLUSION**

26 For the forgoing reasons, the government requests that the Court
27 enter an Order that finds a partial waiver of the attorney-client
28 privilege and compels defense counsel to testify about communications

1 with defendant proffered in the declaration of defense counsel and
2 presented by defendant in her motion.

3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28